

I. CONSOLIDATED DELTA SMELT CASES

A. LARGE CONSOLIDATED CASE

Consol. Delta Smelt Cases, 717 F. Supp. 2d 1021, 1026 (E.D. Cal. 2010);

Facts: FWS issued a BiOp in 2008 and recommended Reasonable and Prudent Alternatives to curb adverse modification, permitting the operations to continue.

Issue: Water Users moved for a preliminary injunction against this BiOp on the grounds that it is arbitrary and capricious and violates the ESA.

District Court: invalidated Component 2 of FWS's 2008 BiOp, regulating coordinated operations of the SWP and CVP addressing impacts on the delta smelt.

9th Circuit Appeal:

- NRDC- court should defer to FWS's determinations, not court's job, battle of experts.
- Water Users- best available science was not used; FWS did not do its job.

Oral Arguments Sept. 10, 2012. We are waiting—fed courts may take a year to decide.

B. NARROW FALL X2 ACTION CASE

In re Consol. Delta Smelt Cases, 812 F. Supp. 2d 1133, 1136 (E.D. Cal. 2011);

Facts: Part of the larger case was the X2 action, decided later because the large case needed to be determined quickly. District court threw out that part of the BiOp and enjoined its implementation.

Fall X2: Component 3/Action 4 of the BiOp RPA – X2 means two parts per thousand salinity and the lines were no more eastward than 74 kilometers from Golden Gate in wet years and 81 kilometers in “above normal” years.

-Project pumping changes this line and affects fish

District Court: Aug 31, 2011—after the larger consolidated case, the court issued a ruling on the fall X2 preliminary injunction.

Issue: Whether the District Court erred in enjoining implementation of the Fall X2 Action.

9th Circuit:

- NRDC—court no longer had jurisdiction, even then should have deferred and kept the injunction to protect the smelt.
- Water Users (Westlands, San Luis & Delta-Mendota Water Authority, Kern County, Coalition for Sustainable Delta, Metropolitan Water District, State Water Contractors) —mootness and grant motion for summary judgment.

On August 16th, the 9th circuit ruled that it was moot and because of that it vacated the D.C.'s findings.

- **Vacated:** as if the case never existed.

Relevancy of these cases to Council: THIS IS ALL ABOUT DELTA WATER and these decisions will clarify issues we have been dealing with since 2004 on the projects and the Delta Smelt. Every decision that comes down takes precedent. These cases are *key* for helping us determine how to use the best available science and protect our endangered species in conjunction with operation of the projects.

We will continue to monitor the potential effects and implications of the larger decision.

II. SETTLEMENT AND DMC CONTRACTORS CONTRACT RENEWAL WITH BUREAU

Natural Res. Def. Council v. Salazar, 686 F.3d 1092 (9th Cir. 2012)

The Bureau regulates CVP—rights to water contracted to water users. In 2003, a BiOp determined that the contracts were not likely to adversely affect the delta smelt. That was stricken and 2005 BiOp came out saying the same thing. The 2008 BiOp has been invalidated as to Coordinated Operations (Delta Consolidated Cases)—2005 BiOp applies.

Contracts:

- (1) DMC Contractors (28)—users who obtain water from the Delta- Mendota Canal
- (2) Settlement Contractors (13)—contracts as part of a settlement with senior rights holders over CVP water in the Sacramento River (SRS).

Relevant Issue: whether the NRDC had standing; whether the Bureau violated legal obligations under § 7(a)(2) of the ESA by renewing contracts without consultation (FWS-BiOp and Bureau Reasonable and Prudent Alternatives).

District Court: P's lack standing; contracts were not discretionary and were thus exempted from § 7(a)(2) compliance because the CVP must comply with California CVPIA and the SWRCB mandate contract renewal, renewal was restrained by prior contract, or SWRCB demanding free delivery of that water with maximum reduction of 25% during dry years.

- Also there were shortage provisions in DMC Contracts allowing for environmental water, so the operations arguably would not affect the Smelt.

9th Circuit: upheld District Court decision; no standing July 17 2012.

En Banc Hearing: NRDC requested rehearing or en banc hearing. Panel ordered a response within a day. Some say this suggests the court may agree because “generally a court does not order a response unless it is seriously questioning its earlier decision.”

Dissent (JUDGE PAEZ): The plaintiffs have easily made such a showing that they “must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.”

- Consultation: if the Bureau were to consult with the Service on the DMC contracts, it might choose to provide *less water* to the contractors, which would improve the conditions of the delta smelt and its habitat. There is standing since consultation *could* advance concrete interest
- Discretionary Action:
 - (1) Bureau could simply not renew contracts b/c CVPIA and SWRCB do not require renewal of water contracts, separate from SRS (Sacramento River Settlement) Contracts and subject to interpretation that could go either way according to contracts law.
 - (2) Could have renegotiated terms in the renewed SRS contracts protective of smelt and habitat.
- Shortage Provision: That the shortage provision in the contracts *allow* the Bureau to comply with the ESA certainly does not *ensure* that it will. Provision is irrelevant.

Recall: The *Karuk Tribe* decision on consultation (assuming the discretionary issue is resolved in favor of the NRDC) and “may affect”—where mining activities require NOI’s *because* they “may affect” an endangered species. Similarly, the BiOp is required because it “may affect” the Delta Smelt.

We will continue to monitor to see what the 9th Circuit decides.